SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R3–25–347 OF 2008
MOHAMAD ARIFF J
25 JANUARY 2010

Administrative Law — Judicial review — Application for — Application to quash decision by Minister of Home Affairs banning book published by applicant — Whether supporting reasons provided by Minister — Book already in circulation in Malaysia for over two years — Whether book could confuse Muslims — Whether prejudicial to public order — Failure to give applicant prior notice or right to be heard — Whether Minister's decision illegal, irrational and wholly disproportionate — Printing Presses and Publications Act 1984 s 7(1)

Administrative Law — Remedies — Declaration — Application for judicial review — Application to quash decision by Minister of Home Affairs banning book published by applicant — Whether Minister's decision illegal, irrational and wholly disproportionate — Printing Presses and Publications Act 1984 s 7(1)

The applicant sought judicial review under O 53 of the Rules of the High Court 1980 to quash the decision of the Minister of Home Affairs, the respondent, ('Minister') banning the book published by SIS Forum entitled *Muslim Women and the Challenges of Islamic Extremism*. The book was a compilation of essays submitted during an international roundtable meeting which discussed the issue of Muslim Women Challenge Religious Extremism @2015 Building Bridges between Southeast Asia and the Middle East. The book was published and made available for sale in Malaysia and elsewhere in 2005. It was in circulation in Malaysia for over two years until it was banned by the Minister by issuing an order under s 7(1) of the Printing Presses and Publications Act 1984 ('the Act') on the grounds of being 'prejudicial to public order'. The decision of the Minister did not provide the supporting reasons but merely indicated the ground of public order. The applicant came to know of the order only through the media, and there was no prior notice given to the applicant before the book was banned. Only later, through a letter dated 14 August 2008, the order was formally communicated to the applicant through a letter from the Ministry. The letter stated that the book was found to be in conflict with the guidelines issued by Jabatan Kemajuan Islam Malaysia ('JAKIM'). According to JAKIM, the publication was

prohibited because of its tendency to confuse Muslims, particularly Muslim women. Out of a total of 215 pages in the book, only several paragraphs in seven pages were said to have offended the guidelines, and that too coming from two of the ten articles included in the book.

Held, allowing the application with costs:

(1) The discretion exercised by the honourable Minister is open to an objective assessment by the court in order to determine whether the pre-condition for its exercise has been satisfied on the facts (see para 30).

(2) The belated reasons given through JAKIM reflected a shortcoming in terms of whether, objectively viewed, the Minister could be said to have exercised his discretion within the statutory purpose of the Act. The objection was based essentially on the tendency of the book to confuse Muslims, particularly Muslim women, and that the book contained some passages which might confuse Muslims, particularly those with shallow knowledge of the religion. On an objective assessment, these were not 'public order' issues (see para 34).

(3) There were no objective facts to support the Minister's decision. There were just seven pages of text objected to, out of 200 odd pages. The book itself was in circulation for over two years in Malaysia before the Minister decided to ban it. If the seven passages were capable of creating a public order problem, there appeared to be a singular absence of such likelihood for the two years (see para 35).

(4) There was error of law evident in the decision of the Minister, by the combined grounds of 'illegality' and 'irrationality'. The reaction to the offending passages were wholly disproportionate to the concern expressed. There was therefore merit in according a right of hearing to the applicant. When a book has been in circulation for over two years in Malaysia, it can give rise to a legitimate expectation not to have it prohibited without hearing the party affected (see para 36).

[Bahasa Malaysia summary

Pemohon memohon semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan keputusan Menteri Dalam Negeri, responden, ('Menteri') yang mengharamkan buku penerbitan SIS Forum berjudul *Muslim Women and the Challenges of Islamic Extremism*. Buku tersebut merupakan kompilasi esei yang diserahkan semasa mesyuarat meja bulat antarabangsa yang membincangkan isu *Muslim Women Challenge Religious Extremism @2015 Building Bridges between Southeast Asia and the*

Middle East. Buku tersebut diterbitkan dan dijual di Malaysia dan di tempat-tempat lain pada 2005. Buku tersebut diedarkan di Malaysia selama lebih dua tahun sehinggalah diharamkan oleh Menteri tersebut atas perintah di bawah s 7(1) Akta Mesin Cetak dan Penerbitan 1984 ('Akta') kerana 'prejudicial to public order'. Keputusan Menteri tersebut tidak memberikan alasan-alasan yang menyokong tetapi hanya menyatakan dasar ketenteraman awam. Pemohon maklum akan perintah tersebut hanya menerusi media, dan tiada notis diberikan kepada pemohon sebelum buku tersebut diharamkan. Hanya selepas itu, malalui surat bertarikh 14 Ogos 2008, perintah tersebut dimaklumkan secara rasmi kepada pemohon melalui sepucuk surat daripada kementerian tersebut. Surat tersebut menyatakan bahawa buku tersebut didapati bercanggah dengan garis panduan-garis panduan yang dikeluarkan oleh Jabatan Kemajuan Islam Malaysia ('JAKIM'). Menurut JAKIM, penerbitan itu dilarang disebabkan buku tersebut akan mengelirukan orang Islam, terutamanya wanita-wanita Islam. Daripada 215 muka surat dalam buku tersebut, hanya beberapa perenggan daripada tujuh muka surat yang menyalahi garis panduan-garis panduan tersebut, malah itu juga dalam dua daripada sepuluh rencana dalam buku tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) Budi bicara yang dilaksanakan oleh yang berhormat Menteri terbuka kepada penilaian objektif mahkamah bagi menentukan sama ada pra-syarat perlaksanaannya telah dipenuhi atas fakta-fakta (lihat perenggan 30).

(2) Alasan-alasan yang lambat diberikan oleh JAKIM mencerminkan kelemahan atas sama ada, secara objektifnya, Menteri tersebut telah melaksanakan budi bicaranya dalam maksud statutori Akta tersebut. Bantahan pada asasnya berdasarkan buku tersebut akan mengelirukan orang-orang Islam, terutamanya wanita-wanita Muslim, dan bahawa buku tersebut mengandungi beberapa perenggan yang mungkin mengelirukan orang-orang Islam, terutamanya mereka yang cetek pengetahuan agama Islam. Atas penilaian objektif, ini bukanlah isu-isu 'ketenteraman awam' (lihat perenggan 34).

(3) Tiada fakta-fakta objektif bagi menyokong keputusan Menteri. Hanya tujuh muka surat yang mendapat bantahan daripada 200 muka surat. Buku itu telah diedarkan selama dua tahun di Malaysia sebelum Menteri tersebut memutuskan untuk mengharamkannya. Jika tujuh perenggan tersebut boleh menyebabkan ketidaktenteraman awam, tiada satu pun kejadian sebegitu dalam masa dua tahun itu (lihat perenggan 35).

(4) Adalah jelas wujudnya kekhilafan undang-undang dalam keputusan Menteri tersebut, dengan penggabungan dasar-dasar 'illegality' dan 'irrationality'. Reaksi terhadap perenggan-perenggan yang menggusarkan adalah keterlaluan ke atas kebimbangan yang dinyatakan. Apabila sebuah buku telah diedarkan selama lebih dua tahun di Malaysia, akan membangkitkan jangkaan yang munasabah bahawa pengedaran tersebut tidak boleh dilarang tanpa mendengar pihak yang terjejas (lihat perenggan 36).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on declaration, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 500–571.

Cases referred to

Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83, HC (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 22 (refd)

Chong Chong Wah & Anor v Sivasubramanian [1974] 1 MLJ 38, FC (refd)

Collector and District Magistrate v S Sultan AIR 2008 SC 2096 (refd)

Council of Civil Service Union & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300, FC (refd)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356, HC (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Ministry for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, HC (refd)

National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189, FC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)

Legislation referred to

Federal Constitution arts 8(2), 10, 10(1)(a), 11, Part II, Ninth Schedule Federal List (List I) item 4(k), State List
Human Rights Commission Act 1999 s 4(4)
Printing Presses and Publications Act 1984 s 7(1)
Rules of the High Court 1980 O 53

K Shamuga (Malik Imtiaz Sarwar, Farah Mohd Afzal and Aston Paiva with him) (Azzat & Izzat) for the appellant.

Noor Hisham bin Ismail (Mona Hazratulaswati Fauzi, Nor Shazana Sedek Shah and Natrah Mazman with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Mohamad Ariff J:

INTRODUCTORY FACTS

[1] SIS Forum (Malaysia) ('SIS Forum'), which describes itself as a charitable body limited by guarantee, is seeking, by this application for judicial review under O 53 of the Rules of the High Court 1980, to quash the decision of the Minister of Home Affairs, the respondent, ('Minister') banning the book published by SIS Forum entitled *Muslim Women and the Challenges of Islamic Extremism*. The book itself is a compilation of essays submitted during an international roundtable meeting which discussed the issue of 'Muslim Women Challenge Religious Extremism — Building Bridges between Southeast Asia and the Middle East'. That international roundtable brought together researchers comprising 18 women activists from Indonesia, Malaysia, Philippines, Singapore, Egypt, Jordan, Iran, Morocco and Turkey who met in Bellagio, Italy, on Lake Como sometime between 30 September 2 October 2003, described in the preface to the book as 'the perfect retreat for the participants to engage these issues of serious concern'.

[2] These serious research papers were subsequently edited with the planning and coordination by SIS Forum, and published as the book mentioned earlier. The book comprises ten chapters from ten contributors from Southeast Asia and the Middle East. It is published by SIS Forum and edited by Norani Othman, one of the founding members of SIS Forum, who is also an associate professor and senior fellow at the Institute of Malaysian and International studies ('IKMAS'). The book itself was published and made available for sale in Malaysia and elsewhere in 2005. It was in circulation in Malaysia for over two years until it was banned by the Minister who purported to act under s 7(1) of the Printing Presses and Publications Act 1984 ('the Act'). Acting under s 7 of the Act, the Minister issued an order described as 'Printing Presses and Publications (Control of Undesirable Publications) (No 5) Order 2008 which was subsequently gazetted as PU (A) 26112008. The order itself is dated 2 July 2008, but gazetted only on 31 July 2008.

THE RELEVANT ORDER

[3] It is of importance to look closely at this order in view of the challenge now being made to the decision of the Minister on a number of grounds

which I will elaborate in a moment. But first, it is necessary to study the order in some detail. It is a brief order and it reads:

2. The printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the publication which is described in the Schedule and which is prejudicial to public order is absolutely prohibited throughout Malaysia.

SCHEDULE

Title of Publication	Edited	Publisher	Printer	Language
Muslim Women and the Challange of Islamic Extremist	Norani Othman	SISTER IN ISLAM No. 25, Jalan 5/31, 46000 Petaling Jaya, Selangor, Malaysia	Vinlin Press Sdn Bhd, 56, 1st Floor, Jalan Radin Anum 1 Bandar Baru Seri Petaling, 57000 Kuala Lumpur, Malaysia	English

As indicated in the order itself, the 'printing, importation, production, reproduction, publishing, sale, the issue, circulation, distribution or possession' of the book is 'absolutely' prohibited, with the ground being 'prejudicial to public order'. The ground as reflected in this order is not 'likely to be prejudicial to public order' but is couched in the emphatic '*is* prejudicial to public order'.

[4] I pause at this juncture to highlight the statutory provision in s 7(1) of the Act.

SECTION 7(1)

[5] I quote the full provision in sub-s 1, and it reads as follows:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[6] First and foremost, this provision grants not only a discretionary power by its terms but qualifies it as '*absolute* discretion'. The prohibitions within the purview of the statutory provision ranges from the prohibition on printing to publishing, sale issue, circulation, distribution, and even possession of any prohibited publication. And the prohibition can even extend to any future publications of the publisher concerned. The grounds on which the Minister can rely on are stated as grounds 'in any manner prejudicial to likely to be prejudicial to '(a) public order (b) morality (c) security; or (d) likely to alarm public opinion; (e) likely to be contrary to any law; or (f) otherwise prejudicial to public interest or national interest'. There are therefore six possible grounds on which the Minister can act. On the facts of this current application, the Minister has chosen to act under the ground of 'public order'. This fact, more than any other submitted in argument, is the focus in this case.

THE SUPPORTING REASONS FOR THE GROUND OF PUBLIC ORDER

[7] As seen above, the decision of the Minister did not provide the supporting reasons but merely indicated the ground of public order. But the facts as advanced by both parties do indicate reasons in support of the decision being given after the event. In this regard it is necessary to look further into the factual details beyond the simple, primary facts as indicated thus far. For these facts we need to look at paras 10–17 in the supporting affidavit affirmed by Rozana bt Mohd lsa, one of the directors of SIS Forum. It would appear from the admitted facts that the applicant came to know of the order only through the media, and there was no prior notice given to the Minister to the applicant before the book was banned. It was only after enquiries were made by the applicant to the ministry that the order was formally communicated to the applicant through a letter from the ministry dated 14 August 2008. The letter of 14 August 2008 stated that the ministry had studied the book and found it to be in conflict with the guidelines issued by JAKIM, that is Jabatan Kemajuan Islam Malaysia, in which it is stated that the book allegedly 'menyentuh kesucian Islam, mempropagandakan akidah, hukum dan ajaran yang bercanggah dengen Mazhab Ahli Sunnah Wal Jamaah serta bertentangan dengan fatwa atau pendapat Jumhur Ulama dan menimbulkan keraguan dan kegelisahan awam'. In short the book was viewed as touching on the purity of Islam and effecting to propagandise the creed, tenets and teachings of Islam which conflicted with those of mainstream Islam in Malaysia, namely the *Mazhab Ahli Sunnah Wa Jamaah*, as well as conflicting with the *fatwa* and opinion of the *jumhur ulama*', and raising doubt and public disquiet.

[8] It is noteworthy that this letter did not expressly refer to prejudice to public order. The letter itself is signed by Che Din bin Yusoh, who is described as 'Setiausaha Bahagian', Kawalan Penerbitan dan Teks Al-Quran, for and only behalf of 'Ketua Setiausaha, Kementerian Keselamatan Dalam Negeri'. The applicant was not satisfied with this answer and sought further clarification after obtaining the JAKIM guidelines, to which it received another response from the very same person, Che Din bin Yusoh by letter dated 5 November 2008. The contents of this letter are important and have an important bearing on whether the exercise of discretion by the Minister is proper in law. One other factual point is noteworthy in this connection that has to do with the response given by the ministry to the aforesaid letter of the applicant requesting for further clarification. This letter dated 8 September 2008 from Mohd Russaini bin Idrus, the Setiausaha Sulit Kanan for the honourable Minister. This is what it says:

Ruj. Kami: KDN/MDN/11/004(2)

Tarikh: 8 September 2008

Sister in Islam

No. 7, Jalan 6110

46000 Petaling Jaya

SELANGOR.

Puan,

PERINTAH LARANGAN PENERBITAN BERTAJUK MUSLIM WOMEN AND THE CHALLENGE OF ISLAMIC EXTREMISM

Adalah saya dengan hormatnya merujuk perkara di atas.

2. Untuk makluman pihak puan, Pejabat Menteri Dalam Negeri telah menerima surat permohonan daripada pihak puan pada 25 Ogos 2008. Sehubungan itu, permohonan puan dipanjangkan untuk tindakan Setiausaha Bahagian Kawalan Penerbitan dan Teks AI-Quran.

3. Perhatian dan makluman pihak puan, amatlah dihargai dan diucapkan ribuan terima kasih.

Sekian.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t.

(MOHD. RUSSAINI BIN IDRUS)

Setiausaha Sulit Kanan Kepada Y.B. Menteri

Kementerian Dalam Negeri.'

[9] It seems evident that as far as the Minister was concerned, there was a deference to the views of Setiausaha Bahagian, Kawalan Penerbitan dan Teks Al-Quran of JAKIM.

[10] The important letter dated 5 November 2008 as mentioned above appears as exh P9 to the supporting affidavit. The letter states that the publication was prohibited because it was found to have infringed guidelines 3(i), 3(v) and 3(vii) of the JAKIM guidelines, and these relate to the following:

Guideline 3(i) Tidak Mengandungi Perkara-Perkara Yang Menyentuh Kesucian Islam

Guideline 3(v) Tidak Mempropagandakan Akidah, Hukum dan Ajaran Yang Bercanggah dengan Mazhab Ahli Sunnah Wal Jamaah

Guideline 3(vii) Tidak Menimbulkan Keraguan dan Kegelisahan Awam

[11] Paragraph 4 of the letter summarises the position by stating:

> Justeru itu, Kementerian ingin menekankan bahawa berdasarkan perkara-perkara yang telah disebutkan di atas, penerbitan bertajuk 'Muslim Women and The Challenge of Islamic Extremism' didapati bercanggah dengan Garis Panduan Penapisan Bahan-Bahan Penerbitan Berunsur Islam oleh JAKIM kerana cenderung ke arah mengelirukan umat Islam terutamanya golongan wanita. Penerbitan ini juga didapati cuba merungkai kenyataan mengenai agama Islam mengikut fahaman penulis sendiri dan dikhuatiri mengelirukan umat Islam terutamanya mereka yang cetek agama. Diharapkan surat ini dapat memberikan gambaran yang jelas kepada pihak tuan.

[12] It is apparent from this concluding paragraph that according to JAKIM at least, the publication was prohibited because of its tendency to confuse Muslims, particularly Muslim women. Further, the publication was found to contain statements regarding the religion of Islam based on the personal understanding of the authors and it was of concern that this might confuse Muslims, particularly those with shallow knowledge of the religion. Again it must be stressed that the conclusion does not address the issue of the publication being directly prejudicial to public order.

[13] During the course of submission I had asked counsel to pinpoint to this court the exact passages which was said to have offended the guidelines. Out of a total of 215 pages in the book, only seven pages are said to have offended these guidelines, and that too coming from two of the ten articles included in the book. In actual fact, we are referring to not so much seven full pages but rather a small number of identified paragraphs in those pages. Since the offending paragraphs are relatively brief compared to the entire book, it

will be useful and relevant to quote these objectionable parts of the book. These paragraphs appear on pp 5, 6, 91, 93, 96 and 106.

[14] Page 5:

> Unfortunately Muslim family law and the Shari'ah criminal or legislation when implemented tend to take punitive and discriminatory stances against women. Moreover, several provisions in the Shari'ah criminal laws conflict with constitutional guarantees of fundamental liberties and with the Panel Code. Non-Muslims, when involved in Shari'ah cases, have also felt their freedom and civil liberties threatened. Given the importance of Shari'ah, not just as a system of law but also as a part of Muslim culture, the power and influence it has over a Muslim society and the rest of the citizenry in a multi-religious country like Malaysia cannot be underestimated.

[15] Page 6:

> In Malaysia, on the other hand, amendments to the Constitution, changes made in Muslim family and Shari'ah criminal laws, and other administrative rules and regulations adopted in the area of religion and moral sanctions since the 1980s have the general effect of discriminating against Muslim women, and in some contexts these new laws and amendments to the existing ones had authoritarian tendencies of controlling women's behaviour and identity.

[16] Page 91:

> Not surprisingly, most of the amendments or new regulations pertaining to Muslim family laws also gender-biased in nature. Amendments made in the past decade have eroded further the sphere of rights given to Muslim women. Polygamy and divorce have been made easier for men, and men's financial responsibility towards women has been reduced. Gender bias and discrimination is normalized within the attitude of policy makers, the law drafters, Islamic religious authorities and judges in the Shari'ah courts.
>
> The overall impact on Muslim women has been negative and oppressive. Muslim women who are divorced, abandoned, beaten up or neglected by their husbands often complain of injustice and discrimination in their search for redress through the Shari'ah legal system. When gender bias does not exist in the laws then quite often the attitude or action of Muslim courts and officials have resulted in injustice towards women. Muslim women in particular face inordinate delays in getting a divorce should their husbands object to their divorce petition. It is often easy for Muslim men in Malaysia to contract a polygamous marriage, or irresponsibly divorce their wife or wives, or neglect their children's maintenance or abandon their wives and children. The force of the law is often not available to women either because of gender bias or court procedures that force women to give up pursuing their rights under the law.

[17] Page 93:

> Letters written to the editors of some newspapers and public comments in the print and electronic media by leading members of women's and human rights groups questioned the basis for the offence and the manner of the arrests. Also at issue was gender discrimination in the implementation of the law. Just a few days after the arrest, a Mr Selangor bodybuilding contest took place. That event involved many Malay men exhibiting their well-toned bodies in the most brief underwear, therefore exposing much more of the male aurat. The male bodybuilding contest, however, was never interrupted nor were any of the Muslim male participants arrested for a similar breach of the prevailing Shari'ah laws requiring modesty and banning Muslims from exposing their aurat.

[18] Page 95:

> Thus the struggle of contemporary Muslim women in Malaysia for equality and non-discrimination requires an analysis of the influence of various social and political Islamist fundamentalist movements and actors that have emerged in Malaysia society. These Islamist movements have engendered among those in the state's religious authorities and bureaucracy and also among ordinary faithful Muslims a patriarchal and misogynist mindset and social attitudes.
>
> The struggle for Muslim women's rights, equal treatment and the eradication of discrimination and social bias against women has to be fought on two main and broad fronts. The first is against the biases or discrimination emanating from a 'universal' legacy of patriarchy entrenched in society generally (what we can call 'secular patriarchy'). The second struggle is against the injustice and oppression that emerged from the recent adoption or amendments of some Islamic ideology, laws and rulings that are often gender-biased or discriminatory, and misogynist in nature (in short: contemporary 'Muslim patriarchy')

[19] Page 106:

> If Malaysians, as citizens of a democratic country, have the right to participate fully in the economic, social and political development of the country, why is it that when it comes to religion, we must suddenly shut up and be denied the right of public participation? We pose this challenge to those in the vanguard of the Islamic movement that want to turn Malaysia into an Islamic state: Why would Malaysians support the concept of an Islamic state which asserts different rights for Muslim men. Muslim women and non-Muslims and minorities, rather than equal rights for all? Why should those whose equal status and rights are recognized by a democratic system support the creation of such a discriminatory Islamic state? If an Islamic state means an authoritarian theocratic political system committed to enforcing andocentric doctrinal and legal rulings, and silencing or even eliminating those who challenge its authority and its understanding of Islam, then why should those whose fundamental liberties are protected by a democratic state support an Islam state?

[20] Since the honourable Minister has himself not given the reasons for prohibiting the book, the reasons volunteered by Bahagian Kawalan Penerbitan dan Teks Al-Quran of JAKIM can be legitimately attributed to him. It is pertinent to note what the Minister himself has stated in para 13 of his affidavit in reply:

> … saya sesungguhnya menyatakan bahawa dalam memutuskan sama ada buku ini memudaratkan ketenteraman awam atau tidak, saya telah dinasihatkan dengan sewajarnya oleh kakitangan saya sendiri dan saya telah mengambil kira pandangan yang betul dari pakar-pakar Jabatan Kemajuan Islam Malaysia (JAKIM) dalam membuat kajian terhadap isi kandungan buku tersebut. Namun tiada pengaruh yang dikenakan kepada saya sama ada oleh kakitangan saya atau JAKIM atau mana-mana pihak lain semasa saya melaksanakan budibicara saya mengeluarkan Perintah Larangan ini.

[21] Senior federal counsel who acts for the honourable Minister argued strongly that the Minister was not under duty to provide reasons. Given the facts of this application, the reasons volunteered by JAKIM, after being referred to it by the ministry, have not been denied as inapplicable by the honourable Minister in his affidavit in reply. So this is not a case where reasons are not given; on the contrary, reasons were volunteered, and there being reasons, the issue arises whether this court, in exercise of its judicial review jurisdiction, can enquire into these reasons to form an opinion on whether or not there has been any error of law, or any exercise of discretion which can be regarded as flawed in law and therefore open to correction.

THE APPLICANT'S GROUNDS OF CHALLENGE

[22] I now turn to look at the applicant's several grounds of challenge. First, the applicant argues that the order of the Minister was made without jurisdiction and therefore ultra vires. This argument rests on the need for the Minister in matters affecting the religion of Islam to consult the state religious authorities through the state *fatwa* committee before the Minister can decide to ban the publication on the basis of the several non-compliance with the JAKIM guidelines. Second, the order made should be regarded as illegal ('the principle of illegality') since the book is not a publication which is contrary to public order. The order thereby violates s 7(1) of the Act as well as art 10(1)(a) of the Federal Constitution, Similarly, the reasons given discriminates against women and thereby violates art 8(2) of the Federal Constitution, and is also inconsistent with the guaranteed freedom of religion and thereby violates art 11 of the Federal Constitution. Third, the order is tainted with 'procedural impropriety' by reason of no right of hearing being given to the applicant prior to the Minister making the order, and by reason that no grounds were given by the Minister when he made the order. Fourth, the order is argued as 'irrational' as the term is known and applied in

A administrative law, namely that no reasonable decision maker would have come to the same decision. It was argued that the banning was essentially to prevent criticism against the administration of Islamic law and was an attempt by the Minister to stifle free trade in ideas in the country which is the hallmark of a modern and vibrant democracy. Finally, an argument based on
B the doctrine of proportionality was mounted, and by this argument it was argued that the whole book was not regarded as offensive but merely some paragraphs in seven pages which were said to be against public order.

C INTERNATIONAL OBLIGATIONS AND LEGITIMATE EXPECTATION

[23] As part of the argument for the applicant, an attempt was made to persuade this court to have regard to the doctrine of legitimate expectation in
D relation to certain international obligations to be assumed by the Government of Malaysia and therefore the Minister too. As stated in the written submission for the applicant, 'there is a legitimate expectation on the part of the authors concerned, and the members of the applicant, that they will not be discriminated against on the basis of gender or religion and that
E their freedom of expression will only be curtailed by the Malaysian government in accordance with international human rights norms'. Particular mention was made of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and of course, the Universal Declaration of Human Rights 1948. Reference was also made to the
F Bangalore Principles (Concluding Statement of the Judicial Colloquium held In Bangalore, India) (attended by a delegate from Malaysia) and the following statements made:

> There is a growing tendency for National courts to have regard to … international
G norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete;
>
> It is within the proper nature of the judicial process and well- established judicial functions for National courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic
H law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[24] Emphasis was also placed on the approach taken by the High Court of Australia in the case of *Ministry for Immigration and Ethnic Affairs v Teoh*
I (1995) 183 CLR 273 and the statement therein in that '… ratification of the convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation,

absent statutory or executive indications to the contrary, that administrative decision makers will act in accordance with the convention …'. A

[25] By citing the *Teoh*'s case, applicant's counsel, it seems to me, was attempting to persuade this court to be mindful of the approach taken in Australia as being the correct approach to be taken and in keeping with the Bangalore Principles. B

THE RESPONDENT'S GROUNDS

C

[26] At the very outset, senior federal counsel made it known to court that the respondent is mindful that the honourable Minister's decision is reviewable and accept the position that the court can undertake an objective assessment of the Minister's subjective satisfaction. Senior federal counsel further stated that discretion is never unfettered even where an ouster clause exists in the relevant statute. Nevertheless, it was made clear right from the beginning that the applicant's argument based on the applicability of international human rights norms through CEDAW was not accepted because the Malaysian government had made express reservations to it, and the Vienna Treaty provides for reservations to be made. D E

[27] Although accepting that the honourable Minister's exercise of discretion can be reviewed, such was not the case here on the facts since the Minister has exercised his discretion without improper motive, has not misdirected himself in law, has not failed to take into account relevant considerations, has not taken into account irrelevant considerations, and his decision has not militated against the object of the Act. On this point the celebrated case of *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 was cited in support. Further, it was strongly argued that the decision of the Minister was reasonable and the court should be mindful of its duty to guard against any tendency to convert the court's jurisdiction of review into a reconsideration of the merits as if on appeal, citing the case of *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189. Nevertheless, senior federal counsel agreed that the court can enquire into the merits but only in circumstances to establish that the decision is unreasonably or irrationally made. For this proposition, the case of *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] AC 374 was cited, together with *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 22. By resorting to the classical Wednesbury unreasonableness test, senior federal counsel argued that the ground of irrationality only applies 'to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person F G H I

who had applied his mind to the question to be decided would have arrived at it. The court can interfere but to prove this, it would require 'something overwhelming'.

[28] As for the argument in relation to ultra vires and the alleged requirement for the Minister to refer to the state religious authorities before coming to his decision since it concerns a matter of Islamic law, this argument was answered by reference to cases where civil courts have recognised that federal law may in some circumstances promulgated law on Islam under item 4(k), of the Federal List (List I), Ninth Schedule of the Federal Constitution.

APPLICABLE LAW AND FINDINGS

[29] As accepted by both parties, the discretion exercised by the honourable Minister is open to an objective assessment by this court in order to determine whether the pre-condition for its exercise has been satisfied on the facts. The decision of the Minister is, by our jurisprudence, not to be regarded as final although the statutory formula may appear to indicate so. Here, as in other provisions, the discretion is to be exercised is stated as being in the honourable Minister's 'absolute discretion'. But it must still stand the test of whether it has been properly exercised in law, since the question whether the decision has been taken on the ground of public order' is a question of law. See *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 where it was stated the correct view is 'for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds'. This approach has been further emphasised by the Federal Court very recently in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300 where it is said:

> Applying this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

[30] In the course of submission, I was referred to another recent decision of the Federal Court, namely*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ. The highest court in the land has stated in no uncertain terms that 'the fundamental liberties guaranteed under Part II must be generously interpreted and that a prismatic approach to interpretation must

be adopted'. The Federal Court further stressed that 'provisions or restrictions that limit or derogate from a guaranteed right must be read restrictively'. In the context of art 10, such as the case here, 'restrictions' must be read as qualified by the word 'reasonable'. The Federal Court opined:

> Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 1 which reasons are now adopted as part of this judgment.

[31] The Federal Court has now determined that the rights guaranteed by Part II, which are enforceable by the courts of law, 'form part of the basic structure of the Federal Constitution'. It has also categorically stated that provisions of the Constitution 'must be interpreted in keeping with the doctrine of procedural and substantive fairness housed in Article 8 (1)'. It must additionally 'meet the test of proportionality'. Given its immediate relevance to our case here, I quote the pertinent passage in the Federal Court judgment (para 19):

> … when state action is challenged as violating a fundamental right, for example, the right to livelihood or the personal liberty to participate in the governance of the Malaysian Bar under art 5(1), art 8 will at once be engaged. When resolving the issue, the court should not limit itself within traditional and narrow doctrinaire limits. Instead. It should ask itself the question; is the state action alleged to violate a fundamental right procedurally and substantively fair. The violation of a fundamental right where it occurs in consequence of executive or administrative action must not only be in consequence of fair procedure but should also in substance be fair, that is to say, it must meet the test of proportionality housed in the second, that is to say, the equal protection limb of art 8(1).

[32] These are wide pronouncements of the Federal Court binding on this court, and therefore, with due deference to precedent and stare decisis, I have to approach this present case on the same basis. Can it therefore be said, on the facts of this case, and applying the approach of reading encroachments on fundamental liberties restrictively, the honourable Minister has applied procedural and substantive fairness and acted with proportionality?

[33] I have earlier analysed the pertinent facts in this case, and it appears to me that the belated reasons given through JAKIM reflect a shortcoming in terms of whether, objectively viewed, the Minister can be said to have exercised his discretion within the statutory purpose of the Act. The concluding paragraph in the letter dated 5 November, cited earlier, requires re-mention. The objection is based essentially on the tendency of the book to confuse Muslims, particularly Muslim women, and the book contains some

passages which are of concern in that they might confuse Muslims, particularly those with shallow knowledge of the religion. Are these 'public order' issues? On an objective assessment, I think not.

[34] Again I need to refer to the recent Federal Court decision in *Darma Suria bin Risman Saleh* where the term 'public order' has been analysed in depth. Citing and approving the local decision in *Re application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 and the Indian Supreme Court decision in *Collector and District Magistrate v S Sultan* AIR 2008 SC 2096, the Federal Court describes an act which is prejudicial to public order as something which disrupts or has the potential to disrupt 'the even tempo of the life of the community', or 'public safety and tranquillity'. In *Collector and District Magistrate*, it is said that 'public order' is synonymous with 'public safety' and 'tranquillity', and that public order if disturbed, must lead to public disorder. On the facts and evidence before this court in this present case, I fail to find the objective facts to support the Minister's decision. There are just seven pages of text objected to, out of 200 odd pages. The book itself was in circulation for over two years in Malaysia before the Minister decided to ban it. If the seven passages are capable of creating a public order problem, there appears to be a singular absence of such likelihood for the two years. Some may not agree with the critiques found in the book, and this is only to be expected in an academic text, which is what the book is, but to conclude that it creates a public order issue is something that cannot stand objective scrutiny. To that extent an error of law is established on the facts. In *Chong Chong Wah & Anor v Sivasubramanian* [1974] 1 MLJ 38, the Federal Court held that the court had the jurisdiction to determine the validity or propriety of the seizure and impounding of a book under the Control of Imported Publications Act 1958, where it had not been shown that it was seized or impounded under the Ordinance as a prejudicial publication. So it is here in the context of the present Act.

[35] I therefore find an error of law evident in the decision of the Minister, by the combined grounds of 'illegality' and 'irrationality', as these terms are understood in administrative law. I wish to observe that it could even be said the reaction to the offending passages are wholly disproportionate to the concern expressed. On facts such as these, there is merit in according a right of hearing to the applicant. When a book has been in circulation for over two years in Malaysia, it can give rise to a legitimate expectation not to have it prohibited without hearing the party affected.

[36] There are two other issues taken up in submission which I need to address. The first concerns the argument that the Minister has no jurisdiction to prohibit the book on the grounds stated, since these are matters within the

State List and should be decided by the state authorities. I am in agreement with the respondent's position that item 4(k), List I, Ninth Schedule supplies the answer to this argument, with its reference to 'ascertainment of Islamic law… for purposes of Federal Law'.

[37] Secondly, in relation to the applicability of international norms and the approach as exemplified in the Australian case of *Teoh*, the position adopted by the Malaysian courts has been not to directly accept norms of international law unless they are incorporated as part of our municipal law: See *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, for example. I do not believe this position has changed even with the passing of s 4(4) of the Human Rights Commission Act 1999, and its exhortation that 'regard' shall be had to the Universal Declaration of Human Rights 'to the extent that it is not inconsistent with the Federal Constitution'. As for the judicial approach in *Teoh*, I note that even in Australia, this decision has had its fair share of criticism. See eg Alison Duxbury, The impact and significance of *Teoh* and *Lam* in Groves & Lee, *Australian Administrative Law — Fundamentals, Principles and Doctrines* (2007; Cambridge University Press): 'The cases of *Teoh* and *Lam* are part of what has been termed 'a titanic struggle' between the Australian Government and the judiciary over the power to review executive decisions that fall within the ambit of the Migration Act' (at p 300 of the book).

CONCLUSION

[38] By reason of the above-stated grounds, and in view of my findings on the facts and the law, I allow this judicial review application for the substantive relief of certiorari as prayed in para 1 of encl 1. Costs to be taxed, unless agreed, are to be paid by the respondent to the applicant.

Order accordingly.

Judicial review application allowed with costs.

Reported by Kanesh Sundrum